



Targeting worship places: “A Comparative Study on International Humanitarian law and Islamic Law”.

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Abstract:

War and atrocities are not new to this world, Islamic law and IHL both have addressed this subject and have described the principle of warfare such as that the belligerents must minimize incidental harm to civilians and civilian objects including religious site, and that this limits the means and methods that they can use. Islamic law which comprises of sharia and fiqh discusses this subject but it is not codified. Islamic law has not yet been acknowledged when it comes to IHL -even article 38 recognizes general principles of nation as a source. Islam is the second largest religion in the world which mirrors the modern framework of IHL and is complementary to that regime.

Keywords:

Targeting, Worship Places, IHL, Islamic Law.

Introduction:

Bleeding in throes of victimization, killed reprehensibly without distinction: such were the agonies of masses during war in pre-Islamic era, wherein might was right and life seemed valueless, let alone religious sites. Fifteen hundred years ago, gloomy clouds had surrounded the globe, Europe was no exception in this regard. Amidst this darkness, Islam taught its followers not to kill innocents, non-participant of war and not to destroy civilian property including sacred sites. Being unique in nature, the modus operandi of penalizing delinquent are also viable: Allah's wrath and physical punishment or incarceration.¹ Fast forwarding 1400 years, certain conventions were orchestrated –collectively called IHL-in the label of Hague convention, Geneva conventions and under other heads concerned.² Collectively, IHL bifurcated into rules regulating mode of conducting warfare on basis of certain principles and protecting human life by putting label of combatant and civilian as well as reducing agonies of member of armed forces at certain circumstances. Similarly, sacred places are protected unless it poses any threat or hamper military purpose. Despite, presence of these two strands of legal framework regulating the conduct during warfare, sacred sites are not safe. Every sacred site everywhere is vulnerable. In 2002, about 250 Palestinians took refuge in a church, Nativity in Bethlehem, to avoid expected attack and wrath of Israel forces, but the Christian sacred place was left apart by Israel forces. Just over a decade ago, the world watched as the Taliban destroyed the Buddha's of Bamiyan, two enormous statues of the Buddha that had been carved into the cliffs at Bamiyan during the sixth century.³ The Middle East is no stranger to the destruction of cultural heritage during armed conflicts. The holy site (tomb) of Muslim caliph in golden era of demolished by group of terrorist. During war, most vulnerable civilian place is these sacred place. Most sacred place has become most risky place at war. There is good room for reconciliation; it would surely slim the adverse impacts of war as majority of hostilities are being taken place in Muslim nations.⁴

An overview of scale scope composition of International Humanitarian Law:

To begin with underlying discourse of position of sacred places under the realm of International Humanitarian Law (Hereinafter referred as 'IHL'), it's immensely significant to dive deeper in the landscape of IHL and acquire understanding about its application, limit and principles via which it is supposed to navigate with. IHL -a substantial and integral part of international law exclusively applicable at time of war- owes its roots from treaties, conventions, customs and practices. Not only being a widely accepted source whom IHL riddle with, but also its application on sovereign nations (High contracting Parties) reinforce its importance-conventions. On a retrospective glance, journey of convention marked in early 1860's- a decade that witnessed bloodbath in a fateful renowned battle of Solferino-where first known landmark treaty was framed that kept tenacious foundation stone for development of law regulating the human act and at the same time, protecting fellow human from ferocious and inhumane treatment.⁵

In order to curb miseries and to put shackles to human evil instinct, even at time of war, two-fold setup was orchestrated. The 4th Geneva convention of 1949⁶ holds out protection of human life by putting label of combatant and civilian as well as reducing agonies of member of armed forces at certain circumstances.⁷ Whereas, Hague conventions compact unfettered means and modus operandi of engagement (tactics) while in military engagement between warring parties. To be in pace with changing time and to plug loopholes created by unforeseen exigencies, Addition protocol made entry into the orbit of IHL at latter half of 20th century.⁸ These all, one way or others, touch the question that what is the position of sacred places under IHL.

Places of worship under IHL:

The principles of limitations bulwark place of worship at the time of war. These principles of limitations are:

- Principle of distinction
- Principle of necessity
- Principle of proportionality
- Principle of precaution

To understand real time position of sacred place under IHL, combine effect of these principle is imperative. Religious places are in shelter from being targeted vis-à-vis other places by virtue of Principle of distinction. Civilian object must be distinguished from military object. Sacred place is a civilian object that can't be destroyed at time of war under Rule 7 of CIHL; IAC/NIAC.⁹ Although, Hague Convention fails to articulate clearly, yet Article 25 ibid champions the protection of undefended places. IN similar context, Article 27 of the 1907 Hague Regulations bound warring party -at the time of bombardments- to ensure protection of buildings dedicated to religion.¹⁰

Furthermore, the principle of distinction also found its place, better saying undisputed one, in Article 48, 51 and 52 of Addition Protocol 2 of convention, Ottawa convention and Rome Statue 1998.¹¹ Likewise in notion of cultural property it is protected. According to "Article 4 of the 1954 Hague Convention for the Protection of Cultural Property the High Contracting Parties undertake to respect cultural property,¹² situated within their own territory as well as within the

territory of other High Contracting Parties ... by refraining from any act of hostility directed against such property”.¹³ It is pertinent to mention court opined in Nuclear Weapons case 1996 the principle *cardinal and inviolable*. But is it absolute?¹⁴ Exception are everywhere as else in situation at hand; under principle of necessity the place of worship can be targeted. ICRC, “Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009”¹⁵ explains this phenomenon. It is impliedly mentioned in “Article 5 of the 1907 Hague Convention (IX) that in bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific or charitable purposes, on the understanding that they are not used at the same time for military purposes”.¹⁶

The subject place-if used for military purposes and “the act must likely to affect adversely the military operations or military capacity of a party to an armed conflict”¹⁷ – loses its protection and force can be use that is necessary to overpower the enemy conditioned with Article 57 of Additional Protocol 1 regarding cause minimum damage and to neutralize the antagonist. Likewise, reasonable precaution is precondition to extra-ordinary measures as mentioned under Rule 15 of CIHL, article 57 of AP I, IAC/NIAC].¹⁸ Attacking the erstwhile protected site, warring parties must act in consonance with principle of proportionality. Hence, principle of distinction is paramount followed by proportionate harm in case of military necessity preceded by viable precaution.¹⁹

Islamic Principles on War:

Islamic law of war is based on Quran and Sunnah, being primary sources, and others being secondary are “ijmā’ (consensus of legal opinions), and qiyās (legal analogical or deductive reasoning). If no rulings can be found in these sources, the mujtahids exercise legal reasoning (ijtihad) through a number of supplementary sources or jurisprudential methods to develop Islamic Laws”.²⁰ Under Islamic law, fighting a war, jihad, is devotional act if it’s in line with stipulations and injunctions of Islam.²¹ The word ‘Jihad’ came into limelight with dawn of present century with less favorable connotation caused by host of reasons i. e, misinterpretation of Islamic principles and notorious schemes of green eye monsters. The word jihad linguistically talks about warfare and in fact literally means struggle - al-qitaal which literally means combat-in the way and for purpose of Deen of Allah. Jihad turns into battle if violation of Islamic principles takes place, one of those principles is protection of religious places at time of war. It should be remembered that “Jihad is justified for legitimate self-defense, to aid other Muslims and after a violation in the terms of a treaty, but should be stopped if these circumstances cease to exist”.²² It must be conducted in a disciplined way, to avoid injuring non-combatants or their sacred place, with the minimum necessary force, without anger and with humane treatment towards opponents, even prisoners of war. What to say about sanctity religious place where enemy is not degraded and inhumanly treated.

This is beauty of Islam. Although, “Interpretations shifted over time, with Abu Hanifa, founder of the Hanafi school of Sunni Islam, concluding in the 8th century that everything which fighters could not conquer should be destroyed,

including homes, churches, trees, and livestock. But the overwhelming majority of scholars argued against destruction of property”.²³

The first Caliph, Abu Bakr al-Siddique his military commander:

*“Stop, O people that I may give you Ten Commandments to navigate with on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies; do not kill a frail gender, a child, or an aged man; do not chop down fruitful trees; do not vanish inhabited areas (includes places of warships); do not destroy any of the enemies’ sheep, cow or camel except for food; do not set on fire date palms, nor inundate them; do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness... You are likely to pass by people who have devoted their lives to monastic services; leave them alone.”*²⁴

In the religion of Islam, “everything in this world belongs to Allah, and human beings are entrusted with the responsibility of protecting His property and contributing to human civilization”.²⁵ Hence, even during the course of hostilities, “wanton destruction of enemy property-including religious site- is strictly prohibited. Such destruction constitutes the criminal act described metaphorically in the Qur’ān as *fasād fī al-ard*”²⁶ (literally, “destruction in the land”). As a rule, “except when required by military necessity, attacks against enemy property and religious site may only be carried out with one of two aims in mind: to force the enemy to surrender or to put an end to the fighting”.²⁷ And “belligerents must not deliberately cause the destruction of property for the sake of it”.²⁸ The protection of religious site is illustrated from the example that epitomizes the fact. During the reign of Hazrat Umar, second caliph,” when the city of Jerusalem was conquered and freed from the Roman forces. The Patriarch of Jerusalem refused to give the keys of the city to anyone except to the Caliph personally”.²⁹ Therefore, Hazrat Umar travelled “to Jerusalem and met the Patriarch at the gate and they went together to visit the historical Church of Resurrection”.³⁰ When the time of prayer came, the Patriarch courteously offered that the Caliph may offer his prayer in the church. Second caliph declined his invitation and answered, “If I do so, the Muslims may sometime in future infringe upon your rights by pretending to follow my example”.³¹ Instead of praying inside the church, he offered his prayers at its steps outside. This clearly mirrors how Islamic international law deals place of worship during war.

Comparative analysis of IHL and Islamic law pertaining position of place worship in war:

Unlike modern law, Islamic law is of unique sources, nature and of methods. “Islamic law” is not easily defined, “much of the interpretation surrounding Islamic law derives from the complex and highly technical nature of this legal system, coupled with the fact that, historically, Muslims did not use the exact

equivalent of the word 'law' in their languages".³² It's comprised of two legal genres: "Sharia (literally, 'path' or 'way') is the set of divine rules given by God in the Qur'ān or ascribed to the Prophet Muhammad".³³ Fiqh (literally, 'understanding') is described as the "practical rules derived or developed by the jurists from specific sources or proofs".³⁴ In most areas, "Islamic law was never codified, therefore, the main issues are distinguishing between: divine rules (sharia) and human interpretation of rules; rules that are changeable and those that are unchangeable; and rules that apply in all circumstances and those that are contextual".³⁵ The similarities in the principles between IHL and Islamic laws of war implies that "these two legal traditions have the same goals: Promoting the universality of these principles, which transcend legal traditions, cultures and civilizations, is essential for ensuring compliance with IHL".³⁶ In Islam, if property and sacred place is destroyed, it results in two-pronged liability: divine punishment, in addition to a State's enforcement measures. Whereas, deliberate and unjustified targeting of religious place triggers law and such act is deemed as war crime. International criminal court or special tribunal is held to try the delinquent. No concept of divine pleasure etc. exists in this spectrum.³⁷

Under Islamic law, "compliance is not subject to reciprocity; Muslims are expected to comply regardless of the conduct of their adversaries".³⁸ It is not essential for not targeting religious sites that opponents will follow the same. Whereas, IHL works on principle of reciprocity being its lynchpin, "Islamic law makes it abundantly clear that all fighting on the battlefield must be directed solely against enemy combatants. Civilians and their religious place must not be deliberately harmed during the course of hostilities".³⁹ This broad principle is aligned with IHL, "which requires belligerents to distinguish between combatants and civilians and prohibits attacks against civilians or civilian objects (Additional Protocol I of 1977 (AP I), Arts 48 and 51(2); Customary IHL Study (CIHL), Rule 1)".⁴⁰

It is pertinent to mention here that one Islamic jurist has identified "five categories of people are specifically protected from attack under Islamic law: women; children, the elderly; the clergy; and, the *usafa*".⁴¹ Their equivalent in the context of modern warfare "would be civilians accompanying the armed forces who do not take part in actual hostilities and, accordingly, cannot be targeted (Third Geneva Convention of 1949 (GC III), Art. 4 A (4))".⁴² The notion that "belligerents must minimize incidental harm to civilians and civilian objects including religious site, and that this limits the means and methods that they can use, is common to both Islamic law and IHL (AP I, Art. 51(4); CIHL, Rule 17)".⁴³ However, the two legal traditions may differ as to whether or in what circumstances specific means or methods are lawful. As IHL has a different set of rules for international armed conflicts and non-international armed conflicts, "Islamic law also differentiates between war among Muslims (non-international armed conflict) and war between the Islamic state and the non-Islamic world (international armed conflict)".⁴⁴ Unlike IHL, the rules of war governing conflict between Muslims (internal armed conflict) are stricter than those between Muslims and non-Muslims.⁴⁵

Conclusion:

The gist of discussion is that Islamic law as well as IHL overlap each other with spirit to protect human life and religious place from tentacles of war. Islamic law, divine in origin, is observed by followers of Islam but knotty-problem created when its followers fail to observe IHL as it has not been category mentioned among one of the sources. Although, both favors that at time of conflict warring party must not demolish religious site except in case of necessity. Yet, Islamic law has not been incorporated as it is. In order to ameliorate the situation and to protect the sacred places it is sine quo non to observe Islamic law where IHL is tills the land for such inhuman act. There is no principle of reciprocity in Islam, I.H. L can apply this principle of Reciprocity. Likewise, both strand favors action in case of necessity (both interpret necessity differently), but in Islam threshold of deterrence who infringes rule is significantly high. Likewise, Islamic law, observed by more than 150 million people, can be complemented by IHL by harmoniously interpreting both that create a sense of belief that IHL is not Christian in origin but Islamic rules are also included. What necessity is, in fact, a matter of question of fact that deprives the site from protection because it is believed that extra-ordinary circumstances, extraordinary measure. There is need of ijthad necessity in Islam and international jurist endeavor to revise the conditions that allow to attack sacred place as one being that if attack favors the accomplishment of objective, attack is valid. Human lives are more precious of and paramount to other goals. Reconsidering the framework and harmonizing both strands in above-mentioned, if can't end the attack on humanity, it can reduce it scale and incidence.



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